No. 3690

IN THE 12

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.

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This case is submitted upon the pleadings and a stipulation of the facts. It depends upon pure questions of law.

I. Statement of the Case.

Plaintiffs are co-partners engaged in a general shipping and commission business in San Francisco. At the time when this controversy arose plaintiffs were negotiating in London, by F. Green & Co.,

their agent in that city, for the sale of a cargo of Superior Barley to be sent from San Francisco to England, per the French vessel "La Rochejaquelin." On February 25, 1916, F. Green & Co. filed in the office of defendant, at London, a cablegram to plaintiffs at San Francisco, advising, as far as the purposes of this case are concerned, that buyers

> "Offer subject immediate reply 62 not east Southampton 62.6 not north Ipswich *including war risk* considerably best offer yet made this position."

(meaning an offer of sixty-two shillings per quarter if delivered not easterly of Southampton, and sixty-two shillings and six pence per quarter, if delivered not north of Ipswich, the insurance against war risk to be paid by plaintiffs).

Defendant company, in transmitting the message, altered the same, so that it was delivered to plaintiffs in San Francisco reading that the buyers

> "Offer subject immediate reply 62 not east Southampton 62.6 not North Ipswich *not including war risk* considerably best offer yet made this position."

By thus converting the words "including war risk" into "*not* including war risk" the telegram conveyed to plaintiffs the offer that the BUYERS would pay the war risk insurance on the cargo. Plaintiffs accepted the offer as received by them, by cabling: "Offer accepted," and the sale was confirmed on the same day by a message sent by F. Green & Co. to plaintiffs. They would not have ac-

cepted the real offer contained in the message filed in defendant's office at London, but were induced to sell the cargo by the cablegram received.

Plaintiffs received the 62s. 6d. per quarter, being the actual price offered in the message of F. Green & Co., but were compelled to pay the war risk insurance premium, amounting to $6970.54.

QUESTION INVOLVED.

Plaintiffs contend that the gross negligence of defendant in inserting the word "not" into the message and thereby reversing its meaning was the proximate cause of this loss; that without the cablegram plaintiffs would not have sold and transmitted their property, and would not have suffered the loss of the $6970.54.

The gravamen of the action is false representation and resulting damage, and defendant, in violation of its duty of reasonable care, falsely represented to plaintiffs that if they would part with their property, the buyers would pay the $6970.54; in reliance upon the truth of this representation plaintiffs parted with their property. Defendant is liable for the natural and probable consequences of its misleading act; the natural and probable effect of the false telegram was the expenditure by plaintiffs of the $6970.54.

II. Specification of Errors Relied Upon.

The Court erred in deciding that plaintiffs have suffered no loss or damage and giving judgment for defendant.

III. Brief of the Argument.

A. THE PLEADINGS AND AGREED FACTS CONSTITUTE A PRIMA FACIE CASE IN FAVOR OF PLAINTIFFS.

> "Proof of the delivery of the telegram in its altered form threw upon the Company the burden of showing that it had exercised the degree of care and diligence required of it by the law under which it was operating; that is to say, *great care and diligence.*"
>
> Ross J., in *Western Union Tel. Co. v. Cook,* 61 Fed. 624, 630.

B. THE DIRECT, NATURAL AND PROBABLE CONSEQUENCE OF THE FALSE TELEGRAM WAS THE EXPENDITURE OR LOSS BY PLAINTIFFS OF $6970.54.

1. The ruling principle is that

> "One who wrongfully deceives or misleads another to whom he owes the duty of truthful statement, to his damage, is liable for the natural and probable consequences of his act."
>
> *Bank of Havelock v. Western Union Tel. Co.,* 141 Fed. 522 (C. C. A.—8th).

Had the telegram been genuine, plaintiffs would have received, as the net equivalent of their property, $6970.54 more than they actually received.

The expenditure by plaintiffs of the $6970.54 was the natural and probable effect of the false representation made by defendant. Plaintiffs had fixed the price for which they were willing to sell their property; they would not have accepted an offer of a lesser sum (Stipulation XII). They had the right not to sell it. Then came defendant and said: If you will ship your property to England, the purchaser will pay the war risk premium. Plaintiffs, upon the faith of this representation, shipped the property to England, and, in consequence, became obligated to pay $6970.54. The obligation to pay this sum was the natural and probable effect of defendant's false statement that another party would pay it, if plaintiffs would ship the barley. On the assumption that the statements in the telegram were true and that plaintiffs had a right to give faith to them, it would have been unnatural not to accept the offer which met their fixed price; the natural effect of the false statement was to induce plaintiffs to ship their property and consequently incur the expenditure of $6970.54. This expenditure would not have been made, had the telegram spoken the truth. Every expenditure is prima facie a loss to the spender.

The rule as to the damages recoverable in such cases was stated in a case decided by the Circuit Court of Appeals, Fifth Circuit, in May, 1920.

The case referred to is

Western Union Tel. Co. v. Esteve Bros. & Co., 268 Fed. 22.

The Court said:

> "In the absence of a statutory or contractural modification of such liability the party in whose favor it is incurred, if there is a negligent failure to transmit the message correctly, is entitled to recover such damages as are *the direct and natural result* of the breach of duty, including *special damages which the terms of the message disclose to be likely to result from such a default.*"

What were the damages likely to result from inserting the word *"not"* into the instant message?

Had the message been sent correctly, the result would have been that plaintiffs would have kept their barley *and* the amount of the war risk premium.

The likely result of respondent's inserting the word "not" into the message was that plaintiffs would ship the barley and would thereby become obligated to pay the amount of the premium which, but for the respondent's default, they would not have been obligated to pay.

The actual result of respondent's default was that plaintiffs did ship the barley *and* did pay the sum of $6970.54, being the amount of the war risk premium.

Granting that plaintiffs lost nothing in price by shipping instead of keeping their barley, they did lose the $6970.54 paid as war risk premium as the direct and natural result of respondent's breach of duty.

2. It would be immaterial that plaintiffs might eventually have profited as the result of market conditions.

It does not lie in the mouth of the Telegraph Company, after it has caused this expenditure and loss to plaintiffs, to say that it is not liable to make compensation for the loss, because the plaintiffs might never have received from any other purchaser more than was actually paid; or, if they would have held or kept the barley for their own use, that its value might have diminished below the amount which they received as the net result of this transaction.

The District Court said:

> "There is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or kept the barley for their own use, there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received. In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake."

We contend that the possible profit made by plaintiffs on the whole transaction is a false quantity in the case; that *defendant's liability would not be defeated* even if it appeared as a fact that plaintiffs could never thereafter have obtained a higher net sum as the result of a sale, had they wished to sell the barley, or that they could thereafter have purchased barley of the like kind and

quality even at a less price than that actually received, so that eventually they might have profited by defendant's false representation.

Assuming that plaintiffs held the barley for sale only, and that the market had dropped after February 25, 1916, so that plaintiffs eventually profited by the sale made in pursuance of the inducement held out by defendant, the cause of the ultimate profit would have been the fortuitous condition of the market for which defendant could claim no credit. Defendant is responsible for the natural consequences of its act; any possible profit made, in spite of its wrongful act, would not be the natural consequence of the false statement of defendant, nor would any loss which plaintiffs might have suffered, if the telegram had made a true statement, be the result of the telegram. On the contrary, it would have been an improbable and unnatural consequence of the false representation contained in the telegram received that the plaintiffs would be saved an indefinite sum of money by acting upon it. Certainly the direct result of the message was to cause plaintiffs to incur the expenditure of the war risk premium; certainly defendant had no intention of inducing plaintiffs to make this expenditure from any humanitarian motive that plaintiffs, if they did not act upon the message, might eventually lose more than the amount of the war risk premium.

The argument used by defendant and adopted by the lower Court may be placed in its proper light by the following analogy:

Supposing A inflicted a wound upon B with intent to commit an assault. The curing of the wound results in curing a previous weakness in B so that, after the wound is healed, B is stronger than he was before and the assault eventually proves beneficial to B. Or suppose that, as a result of the wound, B is confined to bed, instead of attending to his business in his office on Wall Street. During business hours the office is bombed and destroyed. Could A claim credit, respectively, for having benefited B's health or saved his life?

The proximate consequences of defendant's wrong was the expenditure by plaintiffs of the amount of money which they would not have expended if defendant's statement had been true; the loss suffered thereby is not cured by the possibility that plaintiffs might have suffered a greater loss under possible adverse future conditions which have no causal connection with defendant's act. Plaintiffs would have saved $6970.54, but for defendant's wrongful act.

3. Even if eventual contingent profit were a material fact, it would be matter of defense, the burden being upon the Telegraph Company.

Assuming that plaintiffs' prima facie case could be affected materially by the question, whether "the intending purchaser or any other purchaser would have paid more for the barley than was actually paid," the burden of showing the fact (if it be a fact) that plaintiffs could not have obtained a higher price for the barley, or that plaintiffs could

have purchased barley of like kind and quality even at a less price than was actually received, is upon the defendant. Plaintiffs had the right, either to keep their property for their own use, or to sell it on their own terms.

In case defendant, instead of making a false statement to plaintiffs, had made a true statement, the consequences would have been:

(a) The proximate consequences:

1. Plaintiffs would not have shipped their property, and
2. Plaintiffs would not have expended the $6970.54.

(b) The uncertain, possible future consequences would have been, in the alternative:

1. Plaintiffs would never have sold, but would have kept the barley for their own use.
2. Or plaintiffs would have sold at a future time in a favorable market, received their fixed net price, and saved the war risk premium. In that case they would have been richer by at least $6970.54.
3. Or plaintiffs would have sold at a future time in an unfavorable market and received less than their price. The difference between the sum which they would then have received might have been less than the sum which they actually did receive by more than $6970.54, so that eventually the prima facie loss of the plaintiffs might have been converted into a benefit.

It follows from this that:

First: The false statement in the telegram induced plaintiffs to give up their right to keep the

property for their own use, or to sell it on their own terms, and caused them an expenditure or immediate prima facie loss of $6970.54.

Second: The contingency that circumstances in the future might have shaped themselves in such a manner that eventually the financial loss caused by the false statement of defendant would have been converted into a profit for plaintiffs, is in its nature remote and improbable; it could in no sense be considered a natural consequence of defendant's act.

Third: Even if it were so considered, it would be in the nature of a *defence* operating to overcome the proximate result of defendant's wrong-doing. In other words, the burden would not be on the plaintiffs to show "that the intending purchaser or any other purchaser would have paid more for the barley than was actually paid," (quoting the words of Judge Rudkin), but the burden would be on the defendant to show that no other purchaser would have paid more for the barley than was actually paid. If (again quoting Judge Rudkin) "there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action," the result is (always assuming, without granting, that such a fact is material to the issue) that defendant has presented no defence to plaintiffs' prima facie case of loss.—The Court says that, "for aught that appears in the record, the plaintiffs may have profited greatly by the

mistake," but it is respectfully submitted that the record shows that plaintiffs, as a proximate result of the mistake, lost the sum of $6970.54, being compelled to expend that sum against their consent. In no sense could the plaintiffs ever have profited by the mistake, or as a legal consequence of the mistake; but if they profited in spite of it, the burden is upon defendant to show it. In the absence of any showing, plaintiffs' prima facie case stands.

4. Distinction between instant case and cases relied upon by the District Court.

The Court cites *Acheson v. Western Union Tel. Co.,* 96 Cal. 641.

In that case the telegram was sent to plaintiff, prospective *buyer* of hops. By reason of the negligence of the company, it was delivered to plaintiff erroneously worded. Had it been correctly worded, plaintiff *would have* bought and made a profit. The result of the negligence was apparently that he *lost this expected profit.* Under these circumstances the Supreme Court of this State said:

> "There is nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase."

For all that appeared in the case, the plaintiff could have bought the hops cheaper from some other source. No special damages were shown. In the instant case, on the other hand, it appears that, as a result of the false statement, plaintiffs did

ship their property, and did pay the $6970.54. They would have done neither act, had they not been induced by the false cablegram. Paying the money was the tangible, direct and proximate result of the message. Every expenditure made is prima facie a loss to the party who makes it. An *actual payment* is very different from the *possible receipt* of money in the form of profits expected to be made; the non-receipt is not prima facie a loss to the disappointed party. Making an expenditure is doing something positive, the consequences whereof are capable of accurate measurement; the loss of an expected profit, on the other hand, is something in its nature negative, speculative and uncertain. One will probably save money by not making a purchase; but he will probably not save money by making an expenditure.

The Court also cites *Western Union Tel. Co. v. Hall,* 124 U. S. 444-454.

In that case the plaintiff directed another by telegram to make a purchase for him. Through the negligence of defendant telegraph company the purchase was *prevented.* Had it been made, the plaintiff *might have* made a profit by an immediate resale. The Court held that he could not recover this possible profit.

In the case cited the plaintiff *did not buy,* on account of the negligence of defendant; in the instant case the plaintiffs *did sell,* on account of the negligence of defendant. In the case cited the consequence of defendant's negligence was that plaintiff *did not act,* in the instant case it was that plain-

tiffs *did act.* In the case cited the question was: What *would or might* plaintiffs have gained if they had acted?—a question which could be answered only by speculation and conjecture. In the instant case the question is: What would plaintiffs have kept if they had not actually sold?—a question susceptible of a precise and immediate answer, viz.: They would have kept the $6970.54, which they expended in consequence of the false message.

The Supreme Court, in the Hall case, expressly animadverts upon this fundamental distinction between purely speculative and uncertain damages, such as it was then dealing with, and, on the other hand, an *actual loss,* such as is involved in this case, by saying (p. 458):

> "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, *so as to mislead the party to whom it is addressed,* and *on the faith of which he acts* in the purchase or sale of property, *the actual losses* * * * are clearly within the rule for estimating damages."

In the case at bar the loss of the war risk premium is the identical loss which plaintiffs were seeking to avoid by selecting the proper buyer; it is the identical loss which they suffered as the result of defendant's misrepresentation. Defendant knew that this exact item, viz: the war risk premium was at stake between seller and purchaser; that the value of the word *"not,"* inserted in the cablegram, was the price of this insurance; hence when

defendant falsely told plaintiffs: "This buyer will pay the item if you ship to him," it might reasonably have contemplated that the loss to plaintiffs, when acting upon the false representation, would be the price to be paid by the plaintiffs for the war risk insurance.

5. Correct rule as to measure of damages.

The rule applicable to the instant case is stated in *Jones, Telegraph & Telephone Companies,* § 565, as follows:

> "If one receives a message from his agent stating the price at which the property can be sold, but the price as delivered to the company is really less than that quoted in the received message, and he sells on the strength of the latter price, he may recover for the loss; and the measure of damages is *the difference between the price the property actually sold for and that which he thought he was getting for it,* or, as stated in another way, *the amount of his actual loss* caused by the decrease in the price he obtained.

In *Reed v. Western Union Tel. Co.,* 135 Mo. 661, 34 L. R. A. 492, plaintiff received a telegram from her agent and was misled by it into authorizing her agent to sell her property for $1300, when she believed from the telegram that she was obtaining $1900 therefor. She sued for $600 damages. The company contended that the damages claimed were not the proximate result of its negligence; but the Court said:

> "Plaintiff was led to believe she was offered $1900 for her property. Being willing to

> part with it for that sum, she wired acceptance of the proposition made. The proposal was only $1300, but in this way she was made to accept that proposal. Her agent was clothed not only with apparent, but actual, authority to sell for $1300, so far as he was advised. Being thus empowered to sell, he made a binding contract * * * The deed was forwarded and he delivered it. All this was done upon reliance on the correctness of defendant's action. *Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant?* Does it lie in defendant's mouth to speculate how plaintiff or her agent, by the exercise of care, which it failed to exercise, *might have avoided* her contract with the purchaser?"

A fortiori in the case at bar: Could a more natural consequence ever follow a transaction than this loss of $6970.54 did upon the mistake of defendant? Does it lie in defendant's mouth to speculate how this loss, actually incurred when the premium was paid, *might have been offset by a fortuitous change in the market,* which, had it occurred, would have no causal connection with defendant's act, and for which defendant would have no more right to claim a credit than any other stranger?

In *Hollis v. Western Union Tel. Co.* 18 S. E. 287 (Ga. 1893), the message delivered to the telegraph company quoted the selling price of melons at $12. As delivered to the plaintiff by the telegraph company, the selling price was quoted at $20. Induced by this error in the message plaintiff sent a ship-

ment of melons forward to Atlanta for sale. The Court said:

> "As the message was acted upon by Hollis, he had a right to expect that the market in Atlanta was as the message which he received represented it. As it was not so in fact, his damage would be measured by *the difference between the market he had a right to expect and the one which actually existed* (provided his loss amounted to that much)."

In the instant case the market which plaintiffs had a right to expect, in reliance upon defendant's representation, was the net price set upon their goods by them; the market which actually existed was the net price set upon their goods by them *less the amount of the war risk premium.* The difference between the market plaintiffs had a right to expect and the market which actually existed was the amount of the war risk premium, being the sum of $6970.54. Truly, could a more natural or more certain consequence ever follow a transaction than did this loss upon the false representation of defendant?

The judgment of the District Court should be reversed, and judgment be ordered in favor of plaintiffs as prayed for in their complaint.

Dated, San Francisco,
September 26, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.